

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed:
September 30, 2002

Paper No. 18
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sabert Corporation

Serial No. 75/882,633

Ezra Sutton for Sabert Corporation.

Zhaleh Sybil Delaney, Trademark Examining Attorney, Law
Office 101 (Jerry Price, Managing Attorney).

Before Quinn, Bucher and Holtzman, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Sabert Corporation sought to register the mark
STURDIWARE on the Principal Register in conjunction with
services recited, as amended, as "distributorships, mail
order services, retail store services and computerized on-
line ordering and retail services featuring food containers
of all kinds, including serving trays, platters, plates,
bowls and lids related thereto," in International Class 35.¹

¹ Application Serial No. 75/882,633, filed on December 28,
1999, is based upon applicant's allegation of a *bona fide*
intention to use the mark in commerce

Registration was refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of its recited services.

The case has been fully briefed, but applicant did not request an oral hearing before this Board.

We affirm the refusal of registration.

The test for determining whether a mark is merely descriptive is whether the involved term immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service. In re Venture Lending Associates, 226 USPQ 285, 286 (TTAB 1985).

In support of her position, the Trademark Examining Attorney placed into the record dictionary definitions of the words "sturdy"² and "ware."³ Based on these entries, the Trademark Examining Attorney argues that:

Given the plain dictionary meanings of STURDY and WARE, consumers will immediately recognize that the applicant's dinnerware is sturdy or substantially made when offered under a STURDIWARE name in trade. In that

² **sturdy:** *adjective* ... 2. Substantially made or built; stout; *sturdy* canvas. ... The American Heritage Dictionary of the English Language (Third Edition, 1992).

³ **ware:** *noun* ... 1. Articles of the same kind, made of a specified material or used in a specific application. Often used in combination: earthenware, silverware, hardware, software. ... The American Heritage Dictionary of the English Language (Third Edition, 1992).

the proposed mark STURDIWARE immediately tells the consumer something about the services, it is not suggestive, but merely descriptive.

(Trademark Examining Attorney's appeal brief, p. 12).

By contrast, applicant asserts that STURDIWARE is a coined, arbitrary combination of terms that has not been previously used by others in the industry. Applicant argues that this term is, at worst, suggestive because it "is indefinite, susceptible to multiple connotations and meanings, and requires imagination and thought in order for the relevant public to perceive any significance of the term as it relates to applicant's services of distributing various containers." (Applicant's brief, p. 2).

We must consider the issue of descriptiveness before us in relation to the services identified in the instant application, i.e., retail services featuring a variety of food containers. More specifically, we learn from applicant's Web page, made of record by the Trademark Examining Attorney, that applicant provides food containers for "the foodservice, catering, deli take-out and retail markets." It supplies what it calls "high quality plastics" for the "disposables industry." (<http://www.sabert.com>).

The connotations of the word "sturdy" (e.g., substantially made or stout) apply well to food containers like serving platters having a strong base and tightly-closing lids. Applicant's plastic platter packages and similar containers easily fit into several types of "wares," whether the chosen category be "partyware," "plasticware" or "dinnerware." Accordingly, when it comes to applicant's STURDIWARE, based on the instant record, we agree with the conclusions of the Trademark Examining Attorney that the name applicant has adopted for these goods says it all, and hence is merely descriptive.

Applicant has made several arguments in favor of registration that the Trademark Examining Attorney has clearly answered during the prosecution of this application. We affirm these points in summary fashion:

- The slight misspelling herein (STURDI- instead of STURDY-) does not automatically convert an otherwise descriptive term into a suggestive term. The Supreme Court has held that:

The word, therefore is descriptive, not indicative of the origin or ownership of the goods; and being of that quality, we cannot admit that it loses such quality and becomes arbitrary by being misspelled. Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning...

Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U.S. 446, 455 (1911). Similarly, other cases have recognized that a slight misspelling does not change a merely descriptive term into a suggestive term.

See Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938) (NU-ENAMEL; NU held equivalent of "new"); In re Quik-Print Copy Shops, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (QUIK-PRINT held descriptive: "There is no legally significant difference here between 'quik' and 'quick'"); Hi-Shear Corp. v. National Automotive Parts Association, 152 USPQ 341, 343 (TTAB 1966) (HI-TORQUE "is the phonetic equivalent of the words 'HIGH TORQUE'"); and In re Organik Technologies Inc., 41 USPQ2d 1690 (TTAB 1997) (ORGANIK).

- Almost thirty third-party registrations on the Federal Register demonstrate that the Office has consistently held the word STURDY (and its various spellings) as descriptive for a wide variety of goods, including but not limited to a range of plastic containers. Some of these marks having the word STURDY combined with highly descriptive or

generic terms issued on the Supplemental Register.⁴

Where STURDY formative marks have issued on the Principal Register, they were registered with the benefit of a showing of acquired distinctiveness, or in appropriate circumstances (e.g., non-unitary, composite marks) with disclaimers of the word STURDY (or STURDI).

- A designation that is merely descriptive for a type of goods (e.g., platters, food containers, and the like in International Class 21) is also merely descriptive of distributorship services featuring those goods (e.g., various retail services in

⁴ Applicant's response of August 20, 2001 - in addition to applicant's arguments as to why this designation is not merely descriptive - contained the following sentence: "If the Examiner still is not persuaded that the mark is not descriptive[,], applicant requests that the mark be registered on the Supplemental Register." While the Trademark Examining Attorney then maintained her final refusal - failing to respond at that time to this request - the Trademark Examining Attorney points out in footnote 5 of her appeal brief that this is an intent-to-use application where the allegation of use under Section 1(c) of the Act has still not been filed. Accordingly, amendment to the Supplemental Register is not permissible.

However, we do take issue with the Trademark Examining Attorney's suggestion as to applicant's current options herein. Because applicant has pursued this appeal to final decision rather than electing to file an Amendment to Allege Use (AAU) along with an amendment to the Supplemental Register, applicant may not return to its previous position and pursue registration on the Supplemental Register with this application. Of course, provided applicant has indeed made use of this designation, it may file at any time a new application based upon use of this alleged mark in commerce, requesting registration of this matter on the Supplemental Register.

International Class 35). Cf. In re Bonni Keller Collections Ltd., 6 USPQ2d 1224, 1227 (TTAB 1987).

- The fact that applicant may be the first and only user of a term does not justify registration if the term is merely descriptive. See In re National Shooting Sports Foundation, Inc., 219 USPQ 1018 (TTAB 1983). Hence, that none of applicant's competitors has used this exact formulation does not demonstrate that the designation is not merely descriptive.

Decision: The refusal to register is affirmed.